



May 12, 2000

Ms. Lamis A. Safa
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2000-1858

Dear Ms. Safa:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136120.

The City of Houston (the "city") received a request for photographs taken by a city investigator of a traffic accident. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. To show that section 552.103 is applicable, the governmental body must demonstrate that: 1) litigation is pending or reasonably anticipated at the time of the request, and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether

litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

First, we address your argument regarding what concrete evidence this office requires a governmental body to provide to prove that it reasonably anticipates litigation. This office has held that a governmental body reasonably anticipates litigation when it receives a claim letter and affirmatively represents to this office that the claim letter complies with the notice requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996). You have restated the proposition in Open Records Decision No. 638 as follows:

To satisfy the Litigation Exception, a governmental body must represent to your office that the letter is in compliance with the notice requirements of the Texas Tort Claims act or an applicable municipal ordinance *unless the face of the letter clearly states that this is already so*. [Citation omitted.] In the latter case, when the face of the letter clearly demonstrates that the letter is meant to serve as notice under the Texas Torts Claims Act or an applicable municipal ordinance, such a representation by a governmental body is not necessary because the letter unmistakably states as much. [Emphasis in original.]

This is an incorrect restatement. Open Records Decision No. 638 concluded that one way a governmental body may meet its burden of showing that it anticipates litigation is to affirmatively represent that the notice of claim it received complies with the notice requirements of the TTCA or an applicable municipal ordinance. This office will not look to the face of the claim letter as contended by the city. The claim letter's assertion that the notice of claim is written pursuant to the TTCA does not necessarily mean that the notice actually complies with the notice requirements of the TTCA. If a governmental body chooses to not make such a representation, it may still meets its burden of showing that it anticipates litigation by presenting this office with other concrete evidence of why it anticipates litigation.¹ Thus, if a governmental body does not represent that the notice of claim complies with the TTCA, and instead relies only on the face of the claim letter to do so without presenting other concrete evidence to show that it anticipates litigation, then the governmental body fails to meet the first prong of section 552.103.

Here, you have submitted a series of letters from the claimant's counsel which make demand on the city for damages and threaten a lawsuit should settlement not ensue. We conclude

¹This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

that litigation is reasonably anticipated, and that the photographs submitted are related to the anticipated litigation for purposes of section 552.103. Thus, you may withhold the requested information from public disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

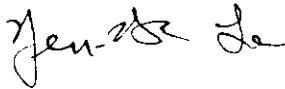
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/CHS/ljp

Ref: ID# 136120

Encl. Submitted documents

cc: Mr. Alex Wallenwein
Attorney at Law
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Houston, Texas 77006
(w/o enclosures)